

**Thomas Jefferson to Henry Dearborn, January 5, 1806,  
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Edited by Paul Leicester Ford.**

**TO THE SECRETARY AT WAR J. MSS. (HENRY A. DEARBORN.)**

Jan. 6, 1806.

Dear Sir, —Colo. Hawkins has just put into my hands the papers respecting the claim of the Creek nation on behalf of Emantlau Thlucco, from whom two horses were stolen within the Indian limits by Harris & Allen citizens of the U. S., the former of whom has fled out of the U. S. leaving no property & the other is dead insolvent: he communicated to me also the Attorney general's opinion on the case. This case being of importance as a precedent, I have considered it maturely under the law, the treaty & the principles which prevail between independent nations; the Creeks being in law as well as in fact an independent nation.

The opinion of the Atty Genl is unquestionable, considering the case as it relates to the offending individuals. The laws have reserved to all our citizens, charged within our jurisdiction with any crime or misdemeanor wheresoever committed, a right of being tried by a jury, before a court of competent authority, before they can be punished. Whether prosecuted capitally, or for the penalty of double value, the sentence of a court could alone subject them to evil. Accordingly the 15th § of the act of Congress provides explicitly how, where the offender may be tried, convicted & punished, and evidently confines its views to the proceedings against the citizen solely. But when death, flight, insolvency, or other accident puts the offender out of the way, it then becomes a question between nation & nation, between whom the municipal laws of evidence of either can have no bearing

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on the other. The same law therefore in it's 4th § only declares that *if the offender be unable to pay* for the property he has taken from an Indian, the U. S. shall pay, without saying where the fact shall be tried or on what evidence; and in it's 14th § enacts that if an Indian shall take property within our limits, the superintendent being furnished with *the necessary documents & proofs*, shall demand satisfaction from the Indian nation, without specifying that these must be such documents & proofs as would be required by our municipal law, to which the Indian nation is not at all subject. The proofs then of course are to be such as are usually resorted to between nation & nation, that is to say public documents, depositions, affidavits, certificates, letters, parol evidence, or even common report. All of these are freely adduced between nations, each of them is weighed in the scales of reason & experience, and according to the aggregate impression they make on the common sense of mankind,

they are estimated in determining the belief or disbelief of the fact. Neither party thinks of calling the other to a trial of the fact in a court of its own, where it would be both party and judge. The constitutional organs for foreign relations of the two nations compose jointly the competent tribunal. The instruction therefore given originally by a preceding executive to the agent for Indian affairs, appears to have been well weighed when it directs him to ascertain, *by the best evidence in his power*, the value of the property taken: and of course authorizes him to receive, as well the testimony of Red men, given in what they deem the most solemn manner, as such other evidence as can be obtained, and may be of any weight in the common judgment of mankind towards producing a belief or disbelief of the fact in question. This is the only practical construction which can be given of the act of Congress, which never could be carried into execution in this part if a strict conformity with our municipal laws were requisite, because such evidence as is required by our courts of justice between citizen and citizen could never be had in the cases now under consideration. The law therefore, wisely and justly, avoids specifying the evidence, and leaves the fact to be settled agreeably to the usage of nations. Here then the Creeks affirm that property has been taken from one of their nation, that this cannot be recovered

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in our courts of justice by the individual injured because one offender is dead, the other fled & no property of either existing; & the law says, *if the offender is unable*, paiment *shall be* made out of the Treasury of the U. S. The Superintendent therefore, according to his instructions, is “to ascertain the fact affirmed by the Creeks, *by the best evidence in his power*, and make report of the same & of the case to the Department of War that justice may be done.” I do not see any cause for changing the course of proceeding so established, but on the contrary I believe it to be right & lawful & that it ought to be pursued in this instance.